(1)

91-467

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES B. ELBAUM,

Petitioner,

vs.

EBSCO INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD L. SMITH
(Counsel of Record)
HOLLYER, BRADY, SMITH, TROXELL,
BARRETT, ROCKETT & HINES
342 Madison Avenue - Suite 1818
New York, New York 10173
(212) 490-3340

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QUESTION PRESENTED

Since 1983, service of federal process has been made primarily by private individuals ("any person not less than 18 years of age and not a party to the action") instead of United States marshals. Rule 4(c), F.R.Civ.P. as amended. Marshals' service even when contested carried a strong presumption of validity. The District Court - and other lower courts - have applied the same presumption of validity to uphold service by private individuals.

The question presented is:

When a private individual's service of process is contested, does any presumption that his return is valid violate the defendant's rights of due process of law?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit are those in the caption. The other defendant named in the action, Marina Capital Corporation, defaulted and is not a party to this appeal.

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EBSCO INDUSTRIES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on June 11, 1991.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit denying a petition for rehearing, filed June 11, 1991, has not been reported. It is reprinted in the appendix, page 1a *infra*. *

The decision of the Court of Appeals affirming *per curiam* the decision of the United States District Court for the Northern District of Alabama has not been reported. It is reprinted in the appendix, page 3a *infra*.

The decision of the United States District Court for the Northern District of Alabama has not been reported. It is reprinted in the appendix, page 5a *infra*.

BASIS FOR JURISDICTION

The jurisdiction of the District Court was predicated upon diversity of citizenship, pursuant to 28 U.S.C. §1332. Respondent was a citizen of Alabama. Petitioner and the other defendant were citizens of Arizona.

The order of the District Court (Lynne, S.J.) denying petitioner's motion to vacate a default judgment as void was entered May 22, 1990. On appeal, the Eleventh Circuit affirmed *per curiam* on March 14, 1991 and denied a petition for rehearing on June 11, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* - Citations to appendix pages are " __ a". Citations to the record are by document number ("R. __ ") and page or paragraph.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

Rule 4(c)(2)(A), Federal Rules of Civil Procedure:

> **(c) Service. ... (2)(A)** A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

Rule 4(g), Federal Rules of Civil Procedure:

> **(g) Return.** The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. ... Failure to make proof of service does not affect the validity of the service.

STATEMENT OF THE CASE

Introduction

In this action to pierce a corporate veil, the District Court granted a default judgment for $108,000 against

petitioner. Personal jurisdiction was predicated on a private individual's return of process alleging service on petitioner's mother. Petitioner moved to vacate the default as void. On the basis of the return, the Court denied the motion even though petitioner's mother attested she had not been served and he attested he had never received process. The Eleventh Circuit affirmed.

1. The action

The action was commenced on October 6, 1983 in the United States District Court for the Northern District of Alabama. Respondent sought to hold petitioner personally liable for the debt of a corporation. [R.1] (Another defendant, Marina Capital Corporation, defaulted and is not a party to this proceeding.)

A summons addressed to petitioner was issued on November 9, 1983 and a return by a private individual alleging service of process on petitioner's mother was filed on December 21, 1983. [R.3] [1]

Petitioner did not appear in the action. [2] Solely on the basis of the private individual's return, the court found

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[1] The return alleged that service was made on December 13, 1983 "by serving a person of suitable age and discretion then residing in the defendant's usual place of abode ... Mrs. Elbaum, mother of defendant 33 Barton Drive, Pittsburgh, Pa. 15221." The return was simply signed "Stephen R. De Wick", without address or other identification and without indication that he was qualified under Rule 4(c)(A)(2) to make service.

[2] Petitioner's mother attests that she was never served. [R.15] Petitioner attests that he never received any summons or complaint. [R.13]

personal jurisdiction over petitioner and granted a default judgment for $108,000 on July 30, 1984. [3]

Petitioner never received notice of the default judgment. For virtually six years after entry of the judgment, respondent made no attempt to depose petitioner or to enforce it. Not until March 30, 1990, when petitioner received a telephone call from respondent's attorneys, did he learn of the default judgment taken against him. [R.13 ¶2]

2. Motion to vacate the default judgment as void

Upon learning of the default judgment, petitioner promptly retained counsel and moved to vacate the judgment as void for lack of jurisdiction. [R.12] In support of the motion, his mother attested that she had never been served with process in the action. [4] Petitioner himself attested that he had never received a summons or complaint in the action, from his mother or anyone else. [R.13 ¶¶7, 8]

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[3] Prior to a hearing on respondent's motion for the default judgment, the Clerk of Court mailed petitioner a copy of the court docket listing the action. The docket gave no indication of the basis or substance of the action. [R.13 ¶8] Petitioner, on advice of counsel, wrote a *pro se* letter to the Court denying long-arm jurisdiction. The Court found that this did not constitute an appearance in the action. [6a]

[4] Because respondent made no effort to enforce the judgment for so long, Mrs. Elbaum was not asked for her testimony until more than six years after the purported service. Nonetheless, she was able to testify that she had no recollection of ever receiving process and that, as an experienced businesswoman, she was fully familiar with legal process. "I know what a lawsuit is. I know what service of process is. If anyone had given me any kind of legal papers - whether for my son or anyone else - I certainly would have remembered it." [R.15 ¶¶3, 11, 12]

In response to the motion, respondent failed to submit any affidavit or other evidence to support its return. Respondent offered no explanation for the omission. [R.22]

3. Decisions of the District Court and the Eleventh Circuit

Even though the return was unsupported and was directly contradicted by affidavit testimony, the District Court - without any evidentiary hearing - found that process "was effectively served" and denied petitioner's motion to vacate the default judgment. [6a]

On appeal, the Eleventh Circuit affirmed *per curiam* without opinion. [3a] A petition for rehearing was denied on June 1, 1991. [1a]

REASONS FOR GRANTING THE WRIT

When service of process by a private individual is contested, any presumption that the return is valid violates the defendant's rights of due process

Any presumption of validity of a private individual's return of process, when contested, deprives the defendant of any effective right to challenge the fact of service. This is a denial of fundamental due process: the right to notice of the proceedings and the opportunity to be heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

The strong presumption of regularity given service of process by United States marshals cannot apply to service by private individuals because they do not carry the same credentials.

Unlike marshals, private individuals are not disinterested public officers [5] and they have no special credibility. [6] Even convicted felons may serve federal process. *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986).

In particular, there has been widespread concern that service by private individuals will expose the federal courts to fraudulent service of process - what has been described as "the technique known with apt inelegance as 'sewer service'." *United States v. Brand Jewelers, Inc.*, 318 F.Supp. 1293 (S.D.N.Y. 1970). [7]

When Rule 4 was amended to provide for service by private individuals, it was not expected that the presumption of validity given to marshals returns would apply to private service:

> "The previously strong presumption by courts that service was proper when marshals were the usual process servers no longer may be continued when

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[5] "As a disinterested federal official, the marshal could be trusted to effect service with appropriate diligence and care." Siegel, *Original Practice Commentary C4-8 on FRCP Rule 4*, 28 U.S.C.A. Rules 1-11 at p. 28 (1990 Supp.).

[6] "The private process server is the plaintiff's, or more particularly the plaintiff's lawyer's, agent. The status of officer of the court associated with the marshal is not likely to be appended to the private process server." Siegel, *Practical Commentary on Amendment of Federal Rule 4*, 96 F.R.D. 88, 110 (1983).

[7] *See also:* 4A Wright and Miller, *Federal Practice and Procedure*, §1130 at p. 352 (2d Ed. 1987) ["Thus far, sewer service has been virtually unknown in the federal courts, but it has been quite common in several urban areas."]

private individuals serve process." 4A Wright and Miller, *Federal Practice and Procedure* §1089.1 at p. 40 (2d Ed. 1987).

But federal trial courts - including the court in the present case - have ignored this clear distinction. They continue to give the same presumption of validity to returns by private process servers as they formerly gave to returns by United States marshals. Thus:

> "In light of the amendment of Rule 4, the court sees no reason why a return of service executed by one other than a United States Marshall [sic] should be given any less weight. ... [T]he returns of service ... import a verity 'which can only be overcome by strong and convincing evidence.'" *Trustees of Local 727 P.F. v. Perfect Parking*, 126 F.R.D. 48, 52 (N.D.Ill. 1989)

> "I find that the presumption which cloaks a return of service has not been overcome by the affidavits submitted by the defendants." *In re Chase & Sanborn Corp.*, 58 B.R. 721, 722 (S.D. Fla. 1986)

> "[A] bare allegation by a defendant that he was improperly served cannot be allowed to bely the private process server's return." *FROF, Inc. v. Harris*, 695 F.Supp. 827 (E.D. Pa. 1988)

In the present case as well, the District Court was presented with testimony directly challenging the assertion in the private process server's return that petitioner's mother had been served. Despite that testimony and the fact that no evidence to support the return was submitted, the court - without any evidentiary hearing - found that the return of the private process server was valid on its face.

The defendant's problem - that he must prove a negative - has been aptly described:

> "[I]f a defendant attempts to vacate a judgment on the ground that he was not served, he is faced with an almost impossible burden of proof; he must prove by clear and convincing evidence ... that he was never served on that date ... " Hayes, *Civil Procedure - A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions*, 51 N.C.L.Rev. 1517, 1519-1520 (1973).

A defendant challenging a marshal's return "bumped head on into a de facto if not de jure presumption of the integrity of the marshal's proceedings." Siegel, *Original Practice Commentary C4-16 on FRCP Rule 4*, 28 U.S.C.A. Rules 1-11 at p. 35 (1990 Supp.)

To require a defendant to overcome the same evidentiary mountain when the return is signed by a private individual, who lacks any of the credentials of a disinterested public official and whose credibility is necessarily open to question, is a clear deprivation of due process.

Clearly, the lower courts need guidance from this Court that such a presumption of validity of a private process server's return must be prohibited as a violation of due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: September 9, 1991 Respectfully submitted,

EDWARD L. SMITH
(Counsel of Record)
Hollyer, Brady, Smith, Troxell,
Barrett, Rockett & Hines
342 Madison Avenue
New York, New York 10173
(212) 490-3340

Attorneys for Petitioner

APPENDIX

Decision of Eleventh Circuit
filed June 11, 1991

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7492

EBSCO INDUSTRIES, INC., a
corporation, by and through
its division, EBSCO MEDIA,

Plaintiff-Appellee,

versus

CHARLES L. ELBAUM, a/k/a
CHUCK ELBAUM, CHARLES
EDWARDS or CHARLES THOMAS,
and MARINA CAPITAL
CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, __ F.2d ___).

Before: KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

Decision of Eleventh Circuit
entered March 14, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7492
Non-Argument Calendar

D.C. Docket No. CV-83-L-2394-S

EBSCO INDUSTRIES, INC., a corporation,
by and through its division,
EBSCO MEDIA,

Plaintiff-Appellee,

versus

CHARLES L. ELBAUM, a/k/a CHUCK ELBAUM,
CHARLES EDWARDS or CHARLES THOMAS, and
MARINA CAPITAL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(March 14, 1991)

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Judgment Entered: March 14, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

Decision of United States District Court
for the Northern District of Alabama
entered May 22, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EBSCO INDUSTRIES, INC., A corp., by and through its division, EBSCO MEDIA,

Plaintiff,

vs. CIVIL ACTION

CHARLES L. ELBAUM, a/k/a CHUCK ELBAUM, CHARLES EDWARDS or CHARLES THOMAS, An Individual; and MARINA CAPITAL CORPORATION, CV 83-L-2394-S

Defendants.

ORDER

This cause, coming on to be heard, was submitted upon the motion for relief from void judgment filed in behalf of defendant, Charles Bert Elbaum. Upon consideration of the court file herein, of which the court takes judicial notice, the affidavit of the defendant, Charles Bert Elbaum, the verified response by counsel for plaintiff, the briefs and oral arguments of counsel, the court concludes that the summons

and complaint herein was effectively served upon Charles Bert Elbaum on December 13, 1983; that Charles Bert Elbaum, neither individually nor by counsel, filed an appearance herein, and that on July 30, 1983, default judgment was properly entered against Charles Bert Elbaum.

The motion filed in behalf of such defendant from such judgment by default is accordingly DENIED.

DONE this 22nd day of May, 1990.

/s/ Seybourn H. Lynne
SENIOR JUDGE